

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2014AP1387

Cir. Ct. No. 2011CV2281

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

WILLIAM TOMTEN AND JOSIE TOMTEN,

PLAINTIFFS-APPELLANTS,

v.

ROGER G. MERRY AND MERRY REVOCABLE HOUSE TRUST,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rock County:
MICHAEL R. FITZPATRICK, Judge. *Affirmed in part; reversed in part and
cause remanded for further proceedings.*

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. In this landlord-tenant action, William and Josie Tomten appeal a judgment of the circuit court in which the court denied their motion for reasonable attorney's fees and failed to double the damages award to

the Tomtens for the wrongful withholding of the security deposit. The Tomtens, who asserted numerous claims against Roger Merry and the Merry Revocable House Trust stemming from their former landlord-tenant relationship with Merry, contend that under WIS. STAT. § 100.20(5) (2013-14)¹ and WIS. ADMIN. CODE § ATCP 134.06 (through April 2015), the circuit court should have doubled the damages awarded to them for the wrongful withholding of their security deposit and awarded them reasonable attorney fees. For the reasons discussed below, we affirm in part; reverse in part and remand for further proceedings.

BACKGROUND

¶2 The Tomtens rented the third floor apartment of a residence located in Janesville, WI. The residence is owned by the Trust, and Merry, who is the settlor of the Trust, resided on the lower floors of the residence.

¶3 In December 2011, the Tomtens brought suit against Merry and the Trust asserting twelve causes of action, all of which stemmed from their tenancy. Seven of the causes of action were dismissed or settled by the parties before or at trial and the remaining five causes of actions were tried to a jury, which found in favor of the Tomtens on the following three claims: rent abatement, constructive eviction and unlawful withholding of a security deposit. The Tomtens were awarded \$500 in damages for their rent abatement claim, \$375 for their constructive eviction claim, and \$750 for their security deposit claim.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 After the trial, the Tomtens moved the court for an award of reasonable attorney fees and costs under WIS. STAT. § 100.20 and WIS. ADMIN. CODE § ATCP 134.06(4)(b) in the amount of \$50,169.24.² Attached to the motion was a spreadsheet itemizing the hours the Tomtens' attorney spent on the case as a whole, multiplying those hours by an hourly rate of \$250.00, and adding in other expenses incurred in the course of the litigation. In their motion, the Tomtens also stated that § 100.20(5) "mandate[s]" that they are entitled to receive an award of "twice" the amount of their security deposit that was wrongfully withheld.

¶5 Following a hearing on the motion, the circuit court denied the Tomtens' request for attorney fees and declined to double any portion of the damages awarded to them, and an order to that effect was entered. Thereafter, the court entered a final judgment. The Tomtens appeal. Additional facts will be discussed below as necessary.

DISCUSSION

¶6 The Tomtens contend that the circuit court erred in failing to double the damages awarded to them as a result of the wrongful withholding of their security deposit and in failing to award them reasonable attorney's fees. The Tomtens argue that because the jury found that Merry and the Trust wrongfully withheld their security deposit, the court was required to award them double damages and attorney fees under WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE § ATCP 134.06.

² The Tomtens' motion also requested an additional \$4,275.00 in attorney's fees for time spent on a third-party claim against Merry's and the Trust's insurer, which was ultimately dismissed.

¶7 The interpretation and application of a statute to a set of facts presents questions of law that we review de novo. *State v. Arends*, 2010 WI 46, ¶13, 325 Wis. 2d 1, 784 N.W.2d 513. The interpretation of an administrative rule, like the interpretation of a statute, is also a question of law, subject to de novo review. *Brown v. Brown*, 177 Wis. 2d 512, 516, 503 N.W.2d 280 (Ct. App. 1993).

A. Double Damages

¶8 The Tomtens assert that pursuant to WIS. STAT. § 100.20(5), the circuit court was obligated to double the damages awarded to them from the wrongful withholding of their security deposit and that the court erred in failing to do so.

¶9 In refusing to double the amount of damages awarded to the Tomtens for the wrongful withholding of the Tomtens' security deposit, the circuit court concluded that the Tomtens had "forfeited" any claim they might have for double damages. The court stated that although the Tomtens had made "a request ... in the briefing for doubling of the security deposit of \$750 that they did not get back ... it's only mentioned as a 'claim,' or words to that effect It's not a stipulation by [the Tomtens] that any amount should be doubled." According to the court, "[t]his alone is enough for the [Tomtens] to have forfeited the amounts on appeal"³ We disagree.

³ Forfeiture is an administrative doctrine which requires a party to preserve an issue for appeal by raising the issue before the circuit court. The purpose of the doctrine is "to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." See *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. In the present case, not only did Tomten raise the issue of double damages below, however minimally, but, as both this opinion and the dissent point out, the circuit court actually

(continued)

¶10 Under WIS. ADMIN. CODE § ATCP 134.06, a landlord is required to return a tenant’s security deposit within twenty-one days after a tenant moves out, or provide an itemized list of accounting for any money withheld from the security deposit. *Armour v. Klecker*, 169 Wis. 2d 692, 699, 486 N.W.2d 563 (Ct. App. 1992) (addressing WIS. ADMIN. CODE § Ag 134.06, the predecessor to § ATCP 134.06). The code provision seeks to discourage landlords from withholding security deposits except in the clearest cases and it specifies those situations in which a landlord is justified in withholding amounts from the security deposit. *Pierce v. Norwick*, 202 Wis. 2d 587, 594, 550 N.W.2d 451 (Ct. App. 1996). If a landlord withholds amounts from a security deposit not permitted under § ATCP 134.06, the landlord is in violation of the code. *Armour*, 169 Wis. 2d at 699.

¶11 In *Armour* we explained that WIS. ADMIN. CODE § ATCP 134.06 was adopted pursuant to WIS. STAT. § 100.20. *Armour*, 169 Wis. 2d at 698. Section 100.20(5) provides: “Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney’s fee.” We held in *Armour* that “if a court determines that a landlord has violated [§ ATCP] 134.06, it is *required* under the plain unambiguous language of [§] 100.20(5) ... to award double damages and attorney fees.” *Armour*, 169 Wis. 2d at 698 (emphasis added).

ruled on the issue. As we observed in *Kekula v. Corish*, No. 2014AP177, unpublished slip op. ¶34 (WI App Nov. 4, 2014), “[a]pplying the forfeiture rule under these circumstances would serve no purpose.” Accordingly, forfeiture is not applicable.

¶12 As best as we can tell, Merry and the Trust argue that the circuit court did not err in failing to award the Tomtens double damages because it was within the court’s discretion not to do so. However, the law is clear that a circuit court does not have discretion to deny awarding a tenant double damages under WIS. STAT. § 100.20(5) when a landlord wrongly withholds a tenant’s security deposit. See § 100.20(5) (“may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss”); see also *Armour*, 169 Wis. 2d at 698, and *Keyes v. Waldbillig*, No. 2012AP1180, unpublished slip op. ¶¶13-15 (WI App May 9, 2013).⁴ Accordingly, because the jury found that the Tomtens’ security deposit was wrongfully withheld, we conclude that the circuit court erred in not doubling the amount of the Tomtens’ security deposit that the jury found was wrongfully withheld.

B. Reasonable Attorney’s Fees and Costs

¶13 The Tomtens also assert that pursuant to WIS. STAT. § 100.20(5), the circuit court was obligated to award them reasonable attorney’s fees because they prevailed on their claim that Merry and the Trust wrongfully withheld their security deposit.

¶14 The circuit court set forth multiple reasons for denying the Tomtens’ request for reasonable attorney’s fees and costs. The court determined that the Tomtens had “forfeited their right to ask for attorney[’s] fees” in light of the manner in which the case had been litigated. The court explained that it had been left to the court to “do[] the research for the parties that the parties should have

⁴ See WIS. STAT. RULE 809.23(3)(b) (unpublished, authored opinions issued on or after July 1, 2009, may be cited for their persuasive value).

done,” the Tomtens had been “unable or unwilling to make cogent arguments [with any] basis in the law or often any arguments at all,” and the Tomtens’ attorney “ha[d] gone beyond, far beyond what might be considered the bounds of competent practice.” The court then provided examples of the counsel’s poor performance, which need not be restated here.

¶15 The circuit court also determined that the Tomtens were not entitled to reasonable attorney’s fees because the Tomtens requested an amount of attorney’s fees which accounted for all the time their attorney had spent on the litigation of this case, including the claims which had been unsuccessful, but failed to separate out for the court the amount of fees related to the issue of the security deposit, despite the opportunity to do so. As the court described it, the Tomtens presented the court with “an all-or-nothing request ... regardless of the causes of action, the damages, or the proof.” The court explained that the causes of actions alleged by the Tomtens were not interrelated and “were very different factually and legally,” and the court declined “to spend hours wading through those bills and guess as to which billing statements relate to what cause of action and which weren’t.”⁵

¶16 As we explained above in ¶¶10-11, when a landlord wrongfully withholds a tenant’s security deposit, a tenant is entitled to reasonable attorney’s fees and costs under WIS. STAT. § 100.20(5). To the extent the circuit court

⁵ The court also seems to have been under the mistaken belief that in order to be entitled to attorney’s fees under WIS. STAT. § 100.20(5), the tenant must have made a claim for intentional misrepresentation under WIS. ADMIN. CODE § ATCP 134.06. The court stated: “In order to get to [§] 100.20, you have to find—there has to be a finding that [§] ATCP 134.06(4)(b) was violated, and that was the claim regarding an intentional misrepresentation or falsified claim. That’s the [Tomtens’] sixth cause of action. As we know, that was dismissed. It never went to the jury.”

concluded otherwise, the court was wrong. However, although an award of reasonable attorney's fees and costs is mandatory under § 100.20(5), the amount of attorney's fees that are reasonable in a given case is a discretionary determination for the circuit court, and will be upheld unless the court erroneously exercised its discretion. See *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 153, 502 N.W.2d 918 (Ct. App. 1993).

¶17 The circuit court determined that the amount of attorney's fees to which the Tomtens were reasonably entitled is zero, in part because they failed to make a sufficient showing as to what portion of their attorney's fees related to litigation of the issue of their security deposit. We agree with the circuit court that the Tomtens have not satisfied their burden of showing the amount of attorney's fees they are entitled to receive. Accordingly, we conclude that the circuit court properly determined that the Tomtens are not entitled to those fees because the record was insufficient to provide a basis for the court to exercise its discretion.

CONCLUSION

¶18 For the reasons discussed above, we conclude that the circuit court erred in failing to double the damages the Tomtens were awarded for the wrongful withholding of their security deposit. However, we affirm the court's determination that the Tomtens failed to make a sufficient showing as to the amount of attorney's fees they are entitled to receive.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.

No. 2014AP1387(D)

¶19 BLANCHARD, P.J. (*dissenting*). I respectfully dissent from part A. of the Discussion Section of the majority opinion, because the Tomtens failed to provide the circuit court with a clear request for double damages in a case involving multiple causes of action and a split jury verdict that had become unnecessarily complicated. The Tomtens did not need to do much to be entitled to a judgment reflecting double damages, but they failed to do the bare minimum.

¶20 The Tomtens were represented by counsel before the circuit court and again on appeal. Over the course of five pages of their principal brief on appeal, the Tomtens now explain in detail to this court why the circuit court erred in failing to award them double damages. They now explain that they asked the court for double damages because they prevailed on one identified claim at trial, for which double damages are required under identified statutes. They now explain that they were not asking the court to double any of the other damages that they were awarded at trial.

¶21 It was a different story before the circuit court. The Tomtens included the following sentence in a post-trial motion “for attorney fees and cost award” as their entire request for double damages: “Mandated by Wis. Stats. § 100.20(5), the twice amount [sic] of the \$750.00 security deposit is \$1,500.00, plus costs and reasonable attorney’s fees.” This “twice amount” sentence was included in a nine-page motion otherwise explicitly devoted solely to the topic of attorney’s fees, and the import of the sentence could easily have escaped the circuit court’s notice. Not only did this case involve numerous claims and a split jury verdict, but the circuit court made a substantial record that the post-trial

motions phase was only the latest phase in the litigation in which one or both of the parties had failed to present clear arguments on legal topics, unnecessarily complicating the record.

¶22 It is true that, despite the lack of clarity and prominence that the Tomtens gave to the topic of double damages in the context of the case as it was litigated, the careful circuit court did pick up on the single sentence at the post-trial hearing and attempted to give the sentence meaning. However, it remained unclear which of the damages awards were to be doubled under the statute.

¶23 Therefore, I would affirm on the grounds that the Tomtens' attorney forfeited this issue, by leaving the circuit court to do the attorney's work. I disagree with the effective conclusion of the majority that the circuit court was obligated to pull out and scrutinize the verdict forms at the hearing in order to figure out on the spot which successful claims called for double damages and which did not.

